

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LEWIS A. (PETE) PROCTOR, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 ANDERSON & WOOD )  
 CONSTRUCTION COMPANY, INC., )  
 Employer, and AMERICAN CASUALTY )  
 COMPANY, Surety, )  
 )  
 and )  
 )  
 ORIUS CORPORATION, Employer, and )  
 ZURICH AMERICAN INSURANCE )  
 COMPANY, Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 01-022769**

**IC 05-013965**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

May 4, 2007

**INTRODUCTION**

The Industrial Commission assigned this matter to Referee Lora Rainey Breen, who conducted a hearing in Boise on August 30, 2006. Rick D. Kallas represented Claimant; Tyra H. Stubbs represented Defendants Anderson & Wood Construction and American Casualty Co. (collectively, Employer 1); and, Mark C. Peterson represented Defendants Orius Corp. and Zurich American Insurance Co. (collectively, Employer 2). The parties submitted oral and documentary evidence at hearing and took three post-hearing depositions. They then submitted briefs and the matter came under advisement on November 29, 2006.

**ISSUES**

The issues to be determined at this time are:

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1**

1. Whether Claimant incurred a compensable occupational disease.
2. Whether Claimant's condition is due in whole or in part to a pre-existing injury/condition.
3. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care; and,
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD).
4. Whether apportionment for a pre-existing condition is appropriate.
5. Applicability of the "last injurious exposure" rule.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he has proven a compensable cervical spine occupational disease claim at C5-6 *on the left* against Employer 1. In addition, he has proven a compensable cervical spine occupational disease claim at C6-7 *on the right* against Employer 2 under the last injurious exposure rule. He is entitled to appropriate temporary disability benefits and medical benefits, to include surgery at C5-6 and C6-7.

Employer 1 alleges Claimant's condition at C5-6 was due to a non-work related incident or, in the alternative, represents a non-acute aggravation of a pre-existing disease or susceptibility. Moreover, Employer 1 does not owe temporary disability benefits because Claimant was not totally incapacitated from employment while working for Employer 1. Lastly, Employer 1 is not responsible for any medical benefits for the proposed surgery because the surgery is not causally related to the C5-6 level and surgery at that level is unreasonable.

Employer 2 argues Claimant's progressive cervical condition does not meet the requirements of an occupational disease. Further, even if it is determined that the condition is an occupational disease, it manifested in 2001 when Claimant worked for Employer 1 and,

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2**

under the Nelson case, Claimant is not entitled to recover even if his employment aggravated or accelerated the condition. Claimant has acknowledged he has not had any industrial accidents. He is not entitled to any benefits from Employer 2.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. Claimant's Exhibits 1 through 19 and Defendants' Exhibits A through R admitted at hearing; and,
3. The post-hearing depositions of Michael Phillips, M.D. (September 15, 2006), Paul Collins, M.D. (September 18, 2006), and Timothy Johans, M.D. (September 18, 2006).

After having considered all of the evidence and the briefs of the parties, the Referee submits the following Findings of Fact and Conclusions of Law for review by the Commission.

### **FINDINGS OF FACT**

1. At the time of hearing, Claimant was 38 years old. Since dropping out of high school in 1986, he has worked almost exclusively building power lines (power linesperson) for various employers.

2. Claimant's job duties were essentially the same regardless of the employer. They involved repetitive overhead movements while climbing up and working from the pole or, less often, out of a bucket. They required him to look up most of the day, rotate his head back and forth, and strenuously use his arms to lift, reach, push and pull with hand tools and equipment while working overhead. When working out of a bucket, he could sometimes perform his tasks looking straight ahead and reaching forward; however, most of the time his work was above him. He worked eight to twelve hours per day, five to six days per week. With

the exception of a lunch break, he was rarely off the pole or out of the bucket. Claimant described at hearing, among other things, the actions involved in squeezing or “crimping” wire:

Q. Can you demonstrate the type of physical movement that you have to perform with your arms when you’re using a crimper, for example?

A. You just put your wire in it. You have got a big aluminum – it’s like a – like a big dog bone kind of, you put both sides of the wires in and you crimp your wires. You got to have them crimped good, otherwise, you know, if you have got a loose one it will burn the wires down or whatever. So, yeah, you’re sometimes flipped cockeyed with just one hook in the pole, which puts a lot of strain on your back.

REFEREE BREEN: Before you go any further, Mr. Kallas, do you want to describe for the record the motions he was just making or would you like me to do that?

MR. KALLAS: Well, either way, Your Honor. When you’re describing movement that you’re performing with your hands, would you like give us a verbal description while you’re showing us at the same time?

REFEREE BREEN: Like your hands are, what, maybe two feet apart or –

THE WITNESS: Oh. Yeah. Three feet. You have got the bolt bites and you have got to hook your wire into your deal and, then, you got to crimp them.

REFEREE BREEN: Which is above your head.

THE WITNESS: Which is – yeah. Usually it’s above your head, unless you’re working out of a bucket. Yeah. You have just got to crimp them, which – you know.

REFEREE BREEN: Pulling your arms together?

THE WITNESS: Exactly.

REFEREE BREEN: From three foot wide.

THE WITNESS: Right. And it’s aluminum that you crimp them with and you have got bolts that’s got nuts on them that you sit there and twist your – your stick – sit there and twist your stick to tighten them up. Your hoists you’re always jerking and pulling and sucking up wire.

REFEREE BREEN: That’s pulling towards you also, not just –

THE WITNESS: Yeah. You push at you and, then, you pull it back to jack on a hoist. You have got to hang your hoist in the grips and you hang the grips and –

MR. KALLAS: Upwards?

THE WITNESS: Exactly. Always looking up.

BY MR. KALLAS:

Q. Okay. And out of a 10 or 12 hour work day, what percentage of your time is spent with your head extended backwards looking up?

A. I would say ten hours, because you always got to know what's going on above you. And even when you're on the ground you're looking up to make sure the guys are doing their stuff right and that everything is going good. You had to keep your eyes on the guys anyway. It's called a safety watch.

Hearing Transcript, pp. 20-22. Claimant described the crimping tool as similar to a pair of pliers, but three feet long and weighing two to three pounds. He would hold it open with his arms about three feet wide and apply pressure to the wire by squeezing or “mashing” with the tool, *i.e.*, bringing his arms together. He did this repetitively throughout the day, approximately 20 times per hour. Exhibit 2.

3. Claimant began working as a power linesperson for Employer 1 in July 1998. Prior to this, he had not sought medical care for his cervical spine or upper extremities.

4. On March 7, 2001, Claimant presented to an emergency room describing neck and left shoulder pain:

The patient is a 32-year-old male who presents to the emergency department today complaining of a three-week history of pain to his left shoulder. He states that he has to do a lot of crimping of lines since he is a linesman. This involves quite a bit of work with the shoulders and arms. He stated he had been doing quite a bit of crimping three weeks ago when he began experiencing severe pain in his left shoulder. The pain spread to his neck and he had problems with significant pain in his left arm, left shoulder and neck. He took a week off and felt better but when he returned to work, he began having problems once again with pain mainly in his left shoulder now. He does not have any pain in his neck

any longer.

Exhibit 5. A left shoulder x-ray was negative and a cervical spine x-ray showed early degenerative changes at C5-6. The ER physician assessed a likely shoulder strain and possible radiculopathy, prescribed medications and a sling, and referred Claimant to an orthopedist.

5. On March 15, Claimant saw orthopedist Sid Garber, M.D., who found symptoms of radiculopathy down the left arm. He noted, “I think there is an excellent chance that he has nerve root pressure, probably at C5-6 on the left side.” Exhibit 6. Dr. Garber described the relationship between Claimant’s complaints and his job: “The maneuvers that he makes with his arms would certainly explain the stress and strain that he puts on his shoulders and his neck.” *Id.* He requested an MRI and prescribed physical therapy.

6. A March 16 cervical spine MRI showed a C5-6 disk protrusion and “mild central canal compromise with slight deformity of the left ventral cord contour, as well as moderate-to-moderately severe degree of left subarticular recess and neural foraminal stenosis” at C5-6. *Id.*

7. Claimant attended an initial physical therapy evaluation on March 19, 2001, but was unable to continue because he was working out of town Monday through Friday. The therapist provided a traction device, which Claimant found helpful in reducing his pain.

8. On April 19, Dr. Garber referred Claimant to a cervical spine specialist and wrote the following about what he described as “continuous trauma to [Claimant’s] neck and left shoulder while working on power lines”:

[Claimant] described the work that requires maneuvers with his arms and neck that would certainly stress these areas, and over a long period of time, in my opinion, would cause a degenerative process in the neck. He has narrowing at C5-6 and symptoms down his left arm. He does not recall any specific incident that caused the pain, but there certainly has been an aggravation by his job, over a period of time, that has caused the neck pain and the arm pain to increase.

## **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 6**

It is very unusual for a 32-year-old to have these kinds of symptoms. It certainly could be due to a previous injury, but he does not recall one. It could be a genetic problem; but again, in a 32-year-old this is very unusual. It is my opinion that his job, which he described to me, is a significant factor in his problem and objective findings.

*Id.*

9. On April 27, Claimant saw orthopedic surgeon Timothy Floyd, M.D., who noted Claimant awoke on March 1 with pain so severe he thought his neck was broken, even though there had been no specific injury. He recorded subsequent development of left shoulder pain and then severe pain radiating down the posterior aspect of the left arm into the forearm and hand. Claimant told Dr. Floyd his pain had resolved to a large degree, but he still had finger and forearm numbness and weakness of the left upper extremity. Dr. Floyd assessed cervical spondylotic radiculopathy at C5-6 and recommended non-surgical management given the improved symptoms. He wrote, "He is following the natural history of most individuals with a disc herniation in the cervical spine. He is healing spontaneously." Exhibit 8. He noted Claimant had already returned to work and he assigned no restrictions.

10. On November 5, 2001, orthopedic surgeon Michael Phillips, M.D., examined Claimant at Employer 1's request. Dr. Phillips opined Claimant had sustained a work injury on February 15, 2001<sup>1</sup>, that resulted in paracervical muscle strain and left shoulder rotator cuff tendinitis. He concluded Claimant's conditions had resolved with no permanent impairment or need for further treatment, claimant had returned to work with minimal self-imposed restriction, and his prognosis was excellent given his age and general health.

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<sup>1</sup> Claimant did not describe a work-related incident occurring on February 15, 2001 (or any date for that matter) and it appears Dr. Phillips used a date corresponding to either Claimant's reporting of his physical problems, or perhaps the general onset of symptoms.

11. Employer 1 accepted the claim based on Dr. Phillips' reported work injury, although the First Report of Injury/Illness prepared by the adjuster in June 2001 stated "no known injury" and that the condition occurred from regular work activities including lifting and pulling. Exhibit 1. In his telephonic statement provided to the adjuster in August 2001, Claimant said he thought his problems stemmed from "mashing" or crimping wires, which he did repetitively throughout the day and which his physician said caused his problems. He reiterated there had not been a specific incident.

12. Claimant described the symptoms he experienced in February/March 2001 as significant neck pain and feeling like he had a knife stuck in his left shoulder. Throughout his deposition and at hearing, he used the description of "knife-like" pain to distinguish between general muscle aches and the problems he developed in the spring of 2001.

13. Claimant ceased working for Employer 1 in 2002, but kept working as a power linesperson for different employers. He began doing such work for Employer 2 in August 2003. In the time between Dr. Phillips' IME (November 2001) and starting work with Employer 2, Claimant sought no treatment for his neck or upper extremities. Although he described experiencing normal aches and pains, he did not experience knife-like pain again until 2005.

14. Claimant's job duties with Employer 2 were essentially the same as his duties with his prior employers. However, in mid-2005, he began working on a job in Utah that was supposed to last a few weeks, but instead took several months to complete. He returned home only occasionally for two to three days at a time. In September 2005, while working the Utah job, he began to feel significant neck and *right* upper extremity symptoms. He last physically worked for Employer 2 on September 17, 2005, after which date he returned home to take care of a family issue.



15. On October 10, 2005, Claimant presented to the Spine Institute of Idaho and saw orthopedic surgeon Edwin Clark, M.D. Dr. Clark recorded *right arm pain* increasing over the prior two weeks: "... the pain radiates from the neck to the posterior aspect of the shoulder, to the right interscapular area and radiating down to his elbow and forearm, mostly on the extensor surface of the forearm into the region of the thumb." Exhibit 10. Claimant described pain, at a level of 10 out of 10, like a knife being turned in the bone. X-rays showed degenerative changes at C5-6, and now also at C6-7. Dr. Clark assessed cervical radiculopathy with cervical spondylosis, the same diagnosis Claimant had in 2001 *on the left side*. He noted Claimant did frequent heavy lifting at work and his pain was accentuated when he looked up, "as he does most of the day while on the job." *Id.* He requested an MRI and took Claimant off work.

16. The October 10 MRI showed degenerative disk disease at C5-6 and, at C6-7, a right posterolateral disk protrusion producing neural impingement on the exiting right C7 nerve root. The imaging center notes described right upper extremity symptoms for two months.

17. In a Worker's and Physician's Report for Workers' Compensation Claims dated October 14, 2005 (Exhibit 1, p. 001004), Claimant reported his current problems as an "aggravation of" his 2001 workers' compensation claim. Claimant thought, "from the first one, you know, it just moved over to the other arm." Hearing Transcript, p. 97. Dr. Clark likewise noted an aggravation and Claimant sought to have his 2001 claim reopened.

18. On October 18, Claimant saw William Binegar, M.D., for a right C7 nerve block. Dr. Binegar documented the following history:

Mr. Proctor describes developing in 2001 neck, left upper extremity pain. He did physical therapy and was eventually doing quite a bit better. Then he describes September 2005 developing increasing difficulty with neck pain and now right upper extremity pain. He describes the pain radiating to his hand and all five fingers. He describes numbness of the right hand. He questions weakness of the

right arm as he feels as if it tires easily.

Exhibit 11. Claimant obtained relief from the nerve block for only one day and Dr. Clark referred him to orthopedic surgeon Joseph Verska, M.D., for follow-up.

19. On November 1, 2005, Claimant saw Dr. Verska, who recorded a history of an “accepted claim for neck injury two to three years ago where it was suggested that he have surgery.” Exhibit 10. Dr. Verska noted right upper extremity symptoms and imaging studies revealing compression on the C7 nerve root on the right. He recommended a two-level cervical discectomy and fusion at C5-6 and C6-7. Under “Impression,” he wrote: “Cervical radiculopathy secondary to a work related injury on a more probable than not basis.” *Id.*

20. On November 15, neurosurgeon Timothy Johans, M.D., examined Claimant at the request of Employer 1 to evaluate the relationship between the 2001 claim<sup>2</sup> and his current symptoms. He also reviewed the medical records from 2001 and 2005. He wrote:

After his last claim, which was ruled as a strain, [Claimant] really did get quite a bit better. He tells me that he was back to work and he had some intermittent neck pain but the left arm was doing pretty well. He is not sure when but he started having right arm intermittent pain and some numbness and tingling. He is starting to have some weakness when he is on the job. The pain gets much worse when he has a load on the arm, which is every day at work. He has no left arm pain at all. He rates his neck pain at an 8-9/10 at the end of the day and it increases with activity. His right arm pain he rates at about a 7/10.

Exhibit 12. Dr. Johans emphasized the distinction between Claimant’s earlier *left-sided* symptoms and his current *right-sided* symptoms and noted the current problems map out “roughly as a right C7 distribution and it goes into the long and index finger, dorsum of the hand, dorsum of the forearm, and up over the triceps and the back of his neck. He does not

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<sup>2</sup> Based on the information provided to him, Dr. Johans thought Claimant had experienced an industrial accident and injury on February 15, 2001. Subsequently, in his post-hearing deposition, he agreed the records really did not contain any reference to a February 15 event.

really have any referable to C6 except some occasional tingling in the right thumb.” *Id.* After comparing the 2001 and 2005 MRI scans, Dr. Johans opined Claimant had a C5-6 disk herniation on the left side in 2001 that is now “gone and he is left with a little calcific density and osteophyte.” *Id.* As such, he opined (“I clearly feel ...”) Claimant’s prior problems at C5-6 on the left are not part of his present issue. *Id.* He agreed that, at C6-7, Claimant currently has new pathology, to wit, disk desiccation and a right posterolateral disk protrusion ventral and to the right side getting pressure near the right C7 nerve root. He also agreed surgery would be in Claimant’s best interest given the C6-7 pathology, and surgery at C5-6, while not presently necessary, would be considered if the C6-7 level was operated on. According to Dr. Johans, Claimant could not narrow down the onset of right arm problems to within a year.

21. On December 15, Dr. Verska wrote to Claimant’s attorney after reviewing medical records related to Claimant’s 2001 claim. Dr. Verska posited the “obvious” question, whether the current need for treatment/surgery is causally related to Claimant’s work activities in 2001 and/or his work activities in September 2005, and indicated:

As stated before, I reviewed the records you provided. Of note, his [*sic*] Dr. Garber’s April 19, 2001 report which he indicated that Mr. Proctor had a C5-6 disc herniation and may need treatment in the form of surgery. Also, Dr. Garber causally related Mr. Proctor’s neck and left arm symptoms to his employment as an industrial lineman. It must also be noted that although there was no specific injury noted by Mr. Proctor, Dr. Garber believed that the disc herniation at C5-6 was probably caused by the typical activities involved with Mr. Proctor’s employment. I would agree with Dr. Garber’s assessment in that regard.

Exhibit 10. Dr. Verska noted Claimant improved significantly in 2001 and was able to return to work. He further noted the development of Claimant’s recent neck pain with right arm symptoms and the MRI findings showing the C6-7 disc herniation with right-sided nerve root impingement. He pointed out the obvious but pertinent fact that Claimant’s current herniation is

at a different level than his prior herniation. He concluded:

In my review of the medical evidence available, it appears that Mr. Proctor's typical duties as an industrial lineman appear to be the primary cause for his current complaints. Again, Mr. Proctor denies any specific incident to cause his current complaints, but since his job is very physical, and involves a significant amount of overhead lifting, twisting, etc., it is my opinion that his current complaints are a result of his employment on a more probable than not basis.

*Id.* Regarding surgery, Dr. Verska explained that, although Claimant no longer has symptoms from the C5-6 disk, he still has pathology there and to fuse C6-7 without fusing C5-6 would increase pressure at C5-6 and wear it out more quickly. He opined Claimant should have both levels surgically addressed at the same time and apportioned the need for surgery equally between the 2001 and 2005 work related issues.

22. On December 28, 2005, Claimant filed a First Report of Injury/Illness related to his employment with Employer 2. The report indicated Claimant performed repetitive and forceful maneuvers as a power linesman in awkward positions with arms extended overhead, and listed the illness/injury as cervical spine disease manifesting December 15, 2005.

23. In June 2006, orthopedic surgeon Paul Collins, M.D., performed a records review of the matter on behalf of Employer 2. In a cover letter to Dr. Collins prior to his review, the primary issue was described as "whether Mr. Proctor's condition is an occupational disease causally related to his work, on a more probable than not basis." Exhibit 16. After reviewing Claimant's medical records, Dr. Collins opined:

... I would be of the opinion, on a more probable than not basis, that Mr. Proctor's cervical spine symptoms and signs are due to a progressive condition not related to his occupation. There is no evidence or comment on any specific injury or episode that caused a material change in his condition, and it appears that he has had waxing and waning of cervical spine symptoms over the years, unrelated to any particular aspect of his work.

*Id.* Dr. Collins agreed Claimant would most likely benefit from surgery but felt it did not relate to his occupation.

The Referee finds it significant that Dr. Collins did not meet with Claimant (*i.e.*, no chance for Claimant to describe his work activities to him) and the cover letter to Dr. Collins contained no description of Claimant's specific work activities. In fact, Dr. Collins' report itself contains *no* reference whatsoever to Claimant's occupation or duties except to say he was a "foreman," who could "avoid repetitive heavy lifting." *Id.* Such a cursory review and analysis is entirely inadequate where a physician is being asked to determine whether a person's condition is an occupational disease causally related to his work. Accordingly, the Referee assigns no weight to Dr. Collins' report as it relates to the issue of causation.

24. Claimant has not returned to work. In addition, he has not undergone the recommended surgery due to the denied status of his claims. Claimant was a credible witness.

25. Employer 1 took the post-hearing deposition of Dr. Phillips. At the time of his deposition, Dr. Phillips had reviewed Claimant's 2005 medical records. As for the 2001 claim, Dr. Phillips continued to opine Claimant had sustained a cervical sprain and rotator cuff injury at work. He agreed that, in so opining, he equated the performance of the repetitive overhead activity described by Claimant as an injury<sup>3</sup>. Despite rather overwhelming evidence to the contrary, Dr. Phillips maintained Claimant did not suffer from radiculopathy (nerve root impingement) or a disk herniation at C5-6 on the left in 2001.

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<sup>3</sup> However, later in his deposition, when questioned by defense counsel, he agreed that what he meant by the terms incident and injury actually related to Claimant waking up one morning with pain; the Referee is not sure how he translated this into a work-related injury, but apparently he did.

Dr. Phillips described the 2001 MRI as showing “the presence of degenerate disease of the cervical spine localized at the C5-6 level, which in all probability, based on the description, preexisted the injury of some eight, nine months previous.” Phillips Depo., p. 14. He indicated he had no reason to dispute Dr. Garber’s opinion that Claimant’s performance of maneuvers with his arms and neck as a power linesman would certainly put stress on his arms and neck. However, he found it unlikely that performing such maneuvers over a long period of time would cause a degenerative process or herniation to occur. He indicated he agreed with Dr. Collins’ opinion that Claimant’s symptoms are due to progressive disk disease unrelated to work. He described the most common causes of such disease as simple aging or perhaps a traumatic injury during youth that could not presently be remembered.

26. Employer 1 also took the post-hearing deposition of Dr. Johans, who remained firmly convinced the problem at C5-6 on the left (2001) had nothing to do with the current problem at C6-7 on the right, and *vice versa*. He indicated Claimant’s current problem is a right C7 radiculopathy stemming from a “natural progression not related to any event that he could inform me of.” Johans Depo., p. 18. In fact, Dr. Johans testified he gave Claimant multiple opportunities to describe an incident, “tried to pull one out of him,” and “could never get an incident that caused this pain down his right arm.” *Id.* at 10. When asked whether he agreed with Dr. Collins’ opinion that Claimant’s cervical spine symptoms are due to a progressive condition not related to his occupation, he answered:

Well, I believe so unless there are clearly documents that I don’t have that show that he’s been having progressive problems with his neck due to his occupation. I don’t think I have that information here, so based on what I have, correct.

*Id.* at 20. But later, somewhat contrary to his prior testimony, he stated, “I don’t know that

[Claimant] has a progressive condition<sup>4</sup>. I know that he has a disk herniation on the right side.

I don't know when it happened. I don't know if it's progressive." *Id.* at 22. He then described the "cause" of degenerative disk disease:

The disk drying out. Many small stresses throughout the day. Little traumas that occur throughout the day that you may or may not mark, remember. Age. Just the general wear and tear of life causes the joint to start to wear out.

*Id.* at 22-23. In an important line of related questioning, Dr. Johans admitted Claimant's power line work could, over time, cause degenerative disk disease in his cervical spine; however, he also demonstrated a serious lack of understanding regarding non-acute industrial conditions:

Q. [By Claimant's counsel] Now, if Mr. Proctor worked as a power linesman for 18 or 19 years in a job that constantly required him to work with this hands overhead while his head was extended back and he was rotating from side to side, would you consider that to be wear and tear on his cervical spine?

A. Sure.

Q. And wouldn't that also put stress on his shoulder and upper extremities?

A. Sure.

Q. And if Mr. Proctor spent 10 or 12 hours a day performing these physical activities over an extended period of time, for example, 18 or 19 years, the cumulative trauma from performing those physical maneuvers over and over and over could eventually cause degenerative disk disease in his cervical spine, couldn't they?

A. Sure.

Q. Now, has any claims examiner or attorney involved in this case defined the legal distinction between an accident [*sic*] injury workers' compensation claim under the Idaho Workers' Compensation Act, and an occupational disease workers' compensation claim?

A. No.

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<sup>4</sup> Here, he is responding to the question of whether the "progressive condition" referred to in Dr. Collins' report is degenerative disk disease.

Q. *Has anyone ever told you that you do not have to have a specific accident or incident or injury in order to have a compensable workers' compensation claim under Idaho law?*

A. *If they have told me that, it didn't register because it seems incredible.*

Q. Has any attorney ever explained the elements in a prima facie case for an occupational disease claim to you?

A. I don't know.

*Id.* at 36-37. Emphasis added. Also significant is the fact that, although Dr. Johans' patient intake sheet for Claimant described Claimant's current problem as resulting from the "line of work he does / no accident," Dr. Johans did not ask Claimant to describe his work activities.

Dr. Johans agreed Claimant's current C6-7 problem is a new problem and was not present on the 2001 MRI. When asked what he thought most likely caused Claimant's new problem if, in the interim time period, he had no accident or traumatic event, Dr. Johans simply indicated he did not know. He also said he did not know whether it would be Claimant's job or personal activities that would be the more likely cause. Dr. Johans stated he just wished there was an "event," because that would help a lot.

27. Employer 2 took the post-hearing deposition of Dr. Collins, who by that time had reviewed Claimant's deposition and hearing testimony. Dr. Collins indicated his practice is mainly limited to knee and shoulder conditions, but when he began practicing 30 years ago he did the full gamut of orthopedic surgeries to include the cervical spine. He explained that when he made reference to Claimant's "progressive condition" in his written report he was referencing "progressive versus acute:"

In other words, the changes that we are seeing are: A, not acute. In other words, they did not occur with one incident. B, they are getting – they are progressively – in my estimation, will progressively get worse, in the sense of their – the



changes that you might see on something like an MRI.<sup>5</sup>

Collins Depo., pp. 8-9. Dr. Collins agreed that the progression of this condition could include a herniation. He described general causes of disk degeneration as follows:

Generally, it involves a couple of things. The things that we do know are positively associated with degenerative disk disease in the spine are, the use of tobacco products.<sup>6</sup> That's been shown.

Second, a lot of it is lifestyle. The people that work in a variety of fairly heavy sport activities, physical activities, and in that kind of thing over time.<sup>7</sup>

The third one, unfortunately, we don't know. And some people are more susceptible to degenerative changes in the spine than others. And there's a lot of research being done on that.

Some people think that it's familial. I don't believe that that's been definitely shown. Although, there is an – there is an association with that.

*Id.* at 9. He again opined Claimant's condition was not related to his occupation because there was no traumatic incident and the findings in 2001 were of a degenerative, not acute, nature. He stated he would not, absent an acute event or injury, attribute a herniation to an occupation on a more likely than not basis.

He conceded it was uncommon to see degenerative changes such as Claimant's at age 32. When asked what, if not Claimant's occupation, caused the degenerative condition at C5-6 on the left and C6-7 on the right, Dr. Collins responded: "Well, according to what his – as I recall his deposition, he's been a hunter, he's been fairly physically active." *Id.* at 21. He also indicated Claimant has risk factors for degenerative conditions "all along his spine" because of

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<sup>5</sup> Interestingly, the medical evidence in this matter indicates Claimant's condition at C5-6 actually improved since 2001, even as he developed new pathology at C6-7. Also interesting is the fact that Claimant's other cervical levels, C2-3, C3-4, C4-5, and C7-T1 were entirely normal in 2001, and have remained so.

<sup>6</sup> Dr. Phillips had testified in his deposition that he knew of no correlation between nicotine use and the development of degenerative disk disease.

<sup>7</sup> One common association Dr. Collins provided later in his testimony related to weight lifters, who repetitively lift heavy weights (at the maximum they can lift). It was his recollection that they tended to get degenerative disk disease in the cervical and sometimes lumbar spine.

his use of nicotine products (Claimant chews tobacco; he is not a smoker). He testified the primary bases for finding no work relationship would be lack of hard scientific evidence and lack of an acute onset of the condition “that one could more likely than not ascribe to what he was doing at his employment at the time that he began to complain of these issues.” *Id.* at 25. He indicated he respected Dr. Verska, but “he has his opinion. I have mine.” *Id.* at 26.

## **DISCUSSION AND FURTHER FINDINGS**

**1. OCCUPATIONAL DISEASE.** The Idaho Workers’ Compensation Law defines an “occupational disease” as “a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, . . . .” Idaho Code § 72-102(22)(a). The Law further provides that “[w]hen an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, . . . and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his [or her] disablement as hereinafter limited, the employee, . . . shall be entitled to compensation.” Idaho Code § 72-437.

“Disablement” means “the event of an employee’s becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease,” and “disability means the state of being so incapacitated.” Idaho Code § 72-102(22)(c). Idaho Code § 72-439 limits the liability of an employer for any compensation for an occupational disease to cases where (1) “such disease is actually incurred in the employer's employment,” and (2) where “the employee was exposed to the hazard of such disease for a period of 60 days for the same employer.”

Idaho Code § 72-439 further provides, that “[w]here compensation is payable for an occupational disease, the employer, or the surety on the risk for employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor.”

As such, a claimant must demonstrate (1) that he was afflicted by a disease; (2) that the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged; (3) that he was exposed to the hazards of such disease for a period of 60 days with the same employer; (4) that the disease was incurred in, or arose out of and in the course of his employment, and (5) that as a consequence of such disease, he become actually and totally incapacitated from performing their work in the last occupation in which he was injuriously exposed to the hazards of such disease. In addition, a claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). “Probable” is defined as “having more evidence for than against.” Fisher v. Bunker Hill Co., 96 Idaho 341, 528 P.2d 903 (1974).

Claimant asserts his cervical spine degeneration, to include disk protrusions and radiculopathy at C5-6 on the left (Employer 1) and C6-7 on the right (Employer 2), which he characterizes as distinct occupational diseases, were caused by performing repetitive and forceful maneuvers as a power linesperson in awkward positions with his arms extended overhead and while looking up. He described performing such activities eight to twelve hours per day, five to six days per week, over 18 or 19 years. His testimony regarding his job duties is unrebutted and credible. In addition, his testimony regarding the onset of symptoms (*i.e.*, no

accident/event) is also credible. Several physicians have provided medical opinions in this matter and the Referee's further analysis of those opinions is set forth below.

#### Drs. Garber and Verska

Drs. Garber and Verska unequivocally opined Claimant's duties as a power linesperson (*without* any incident/acute injury) caused his cervical spine problems. Both physicians examined and treated Claimant and personally heard and observed Claimant's description of his job duties. Given the facts presented in this case, the Referee finds the treating physicians' opinions sensible and persuasive. Even the non-treating physicians acknowledged Claimant's particular work activities would place significant stress on his neck and upper extremities and they enumerated causes of disk degeneration that included small daily stresses or traumas to the joint (which may or may not be noticed), strenuous physical activity, and daily wear and tear. Claimant spent substantially more time on the job than off and his duties, which he did for nearly two decades, were unique in their emphasis on the neck and arms. He was young, healthy and a non-smoker. Unless the non-treating physicians can provide a better explanation for Claimant's conditions, the opinions of the treating physicians prevail in this matter.

#### Dr. Johans

While Dr. Johans provided a helpful description of the general cause(s) of disk degeneration, his ultimate opinion on causation was equivocal and undermined by faulty assumption. He ascribed the cause of joint degeneration to, "[m]any small stresses throughout the day," "[l]ittle traumas that occur throughout the day," and the "general wear and tear of life," and he conceded the cumulative trauma from Claimant performing his particular job duties repetitively over time could eventually cause cervical spine degenerative disk disease. This seems to follow common sense. Ultimately, however, he concluded he did not know what

most likely caused Claimant's problems and he needed an "event" to relate them to work. The Referee finds Dr. Johans' opinions on causation less than helpful given his erroneous belief that one cannot have a compensable work-related condition without an accident/injury (obviously, such a conviction is particularly problematic in an occupational disease case).

#### Dr. Collins

Dr. Collins' description of the causes of disk degeneration was also somewhat helpful,<sup>8</sup> but, ultimately, his causation opinions were not. Dr. Collins described one of the primary causes of disk degeneration as "work in a variety of fairly heavy sports activities, physical activities, and in that kind of thing over time," and he agreed such progression could include herniation. Nevertheless, he rigidly indicated he would not (apparently ever) attribute on a more likely than not basis a herniation to an occupation absent an acute event or injury. On the other hand, when asked what he thought caused Claimant's degenerative condition at C5-6 and C6-7, which by all reasonable accounts included herniation, Dr. Collins suggested it was more likely Claimant's occasional hunting and general physical activity were the causes -- as opposed to the repetitive, strenuous overhead work Claimant did eight to twelve hours per day, five to six days per week, over 18-19 years. He rendered this opinion even though there was no evidence Claimant ever experienced an acute event/injury while hunting or doing any other type of general physical activity either. His opinion in this regard does not make sense. Moreover, the Referee questions Dr. Collins' ability to objectively evaluate the matter given the incomplete review and analysis involved in forming his initial opinion.

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<sup>8</sup> Except for references to use of smokeless tobacco as a cause. There is no other medical evidence in the record to support this, Dr. Phillips' testimony contradicts it, and Dr. Collins himself said he wasn't sure it applied to smokeless tobacco products.

## Dr. Phillips

Dr. Phillips conceded Claimant's duties as a power linesperson would certainly put stress on his arms and neck, but he felt Claimant's age or a forgotten childhood injury were more likely causes of his degenerative condition. Drs. Garber and Collins opined Claimant's degenerative condition at 32 years of age (his age in 2001) was, respectively, very unusual and uncommon. There is no evidence to support Dr. Phillips' speculative childhood injury theory.

### **A. Employer 1 (2001 condition)**

The Referee finds Claimant has proven his occupational disease claim against Employer 1. In 2001, Claimant sustained cervical spondylosis and radiculopathy at C5-6 on the left caused by continuous trauma to his neck and upper extremities while building power lines for Employer 1. Given the unique stress and strain placed on his neck and upper extremities by his particular job duties, the Referee finds the hazards of the condition actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged. Such hazards included awkward positioning of the neck and arms while lifting, reaching, pulling and pushing with hand tools and equipment. Significant is the fact that most of Claimant's work was overhead and he was required to look up continuously for several hours each day while performing rigorous activity. This is certainly distinguishable from the general run of occupations. Claimant was exposed to the hazards of this cervical condition in excess of 60 days for Employer 1 and the condition was incurred during the course of that employment. Lastly, Claimant was actually and totally incapacitated from performing his work as a power linesperson. He could not get out of bed for two days, took one week off work, and was put in a left arm sling when he went to the hospital. Claimant has met the statutory requirements for compensability.

**B. Employer 2 (2005 condition)**

The Referee finds Claimant has proven his occupational disease claim against Employer 2. In 2005, Claimant sustained cervical spondylosis and radiculopathy at C6-7 on the right caused by continuous trauma to his neck and upper extremities while building power lines for Employer 2. Claimant's job duties with Employer 2 were the same as with Employer 1 and, as such, the hazards of the condition actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment in which he was engaged. Moreover, Claimant was exposed to the hazards of the condition in excess of 60 days for Employer 2 and the condition was incurred during the course of that employment. Lastly, Claimant was actually and totally incapacitated from performing his work as a power linesperson when Drs. Clark and Verska took him entirely off work in October 2005. He has not since been released to return to work. Claimant has met the statutory requirements for compensability.

**2. PRE-EXISTING CONDITION.** Both employers argue Claimant suffered from a pre-existing condition, to wit, degenerative disk disease and, as such, his claims are barred by the Nelson case. The Nelson doctrine provides that a claimant seeking compensation for the aggravation of a pre-existing condition must prove that such aggravation resulted from an industrial accident. Nelson v. Ponsness-Warren Idgas Enterprises, 126 Idaho 129, 879 P.2d 592 (1994). For an occupational disease to be a preexisting condition under the holding in Nelson, there must have been a prior manifestation of the disease. Sundquist v. Precision Steel & Gypsum, Inc., 141 Idaho 450, 111 P.3d 135 (2005).

**A. Employer 1 (2001 condition)**

Claimant began working for Employer 1 in 1998. Prior to coming to work for Employer 1 and prior to reporting symptoms at the hospital on March 7, 2001, Claimant had sought no

treatment for neck and left upper extremity problems. Moreover, Employer 1's own expert, Dr. Phillips, identified Claimant's C5-6 disk degeneration at the time of his March 2001 MRI as only eight or nine months old. His condition did not become manifest until March 2001. Claimant did not suffer from a pre-existing condition relative to his 2001 occupational disease.

**B. Employer 2 (2005 condition)**

Employer 2 argues Claimant's occupational disease became manifest in 2001 and therefore it has no liability in this matter. Employer 2's contention would be accurate for Claimant's cervical spondylosis and radiculopathy at C5-6 on the left; however, it is not true for Claimant's cervical spondylosis and radiculopathy at C6-7 on the right. The evidence in this case establishes that Claimant's 2001 condition not only became asymptomatic, but actually healed. The 2005 MRI continued to show its stabilized and improved state and Claimant had no symptomatology referable to his C5-6 disk in 2005. Claimant had returned to work before treatment was finalized in 2001 and Dr. Floyd opined he could work with no physical restrictions at that time.

On the other hand, Claimant had developed a new condition at C6-7 on the right that arose after the 2001 MRI, but prior to the 2005 MRI. Claimant went to work for Employer 2 in 2003. Prior to coming to work for Employer 2 and prior to his reporting of symptoms to Dr. Clark on October 10, 2005, Claimant had not sought treatment for neck and right upper extremity problems. His condition became manifest in 2005, not 2001. Claimant did not suffer from a pre-existing condition relative to his 2005 occupational disease.

Reference is made in some of the medical testimony to a generalized degenerative disk disease suffered by Claimant that started at C5-6 and was simply progressing. However, based on the stabilized condition at C5-6, and the fact that Claimant's other cervical levels, aside from



the isolated problem at C6-7, have remained entirely normal since 2001, the Referee finds the opinion of Dr. Johans more persuasive. Dr. Johans described the relationship between Claimant's 2001 and 2005 problems as essentially non-existent. Dr. Johans was the only non-treating physician who actually reviewed Claimant's 2001 and 2005 MRIs as opposed to just reading the reports.

**3. MEDICAL BENEFITS.** Based on the findings above, Employer 1 is liable for any and all medical benefits stemming from Claimant's 2001 workers' compensation claim. It appears Employer 1 has already paid those benefits. Employer 2 is liable for any and all medical benefits stemming from Claimant's 2005 workers' compensation claim; this would include payment for the surgery recommended by Dr. Verska. Moreover, the Referee finds the two-level surgery (C5-6 and C6-7) reasonable. She finds, however, that it relates entirely to the 2005 claim. The need for surgery at C5-6 stems from the potential for instability caused by surgery at C6-7. Employer 2 is wholly liable for the recommended surgery.

**4. TEMPORARY DISABILITY BENEFITS.** Based on the findings above, Employer 1 is liable for any and all temporary disability benefits stemming from Claimant's 2001 workers' compensation claim. The evidence is insufficient for the Referee to determine if, or in what amount, such benefits remain to be paid. Employer 2 is liable for any and all temporary disability benefits stemming from Claimant's 2005 workers' compensation claim. Such benefits would begin on October 10, 2005, when Dr. Clark took Claimant off work.

**5. APPORTIONMENT.** The Referee found above that Claimant did not suffer from a pre-existing injury or condition. Apportionment is not appropriate.

**6. LAST INJURIOUS EXPOSURE RULE.** Based on the findings above, application of the last injurious exposure rule is unnecessary.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 25**

## **CONCLUSIONS OF LAW**

1. Claimant incurred a compensable occupational disease, cervical spondylosis and radiculopathy at C5-6 on the left, referable to his employment with Employer 1. He further incurred a compensable occupational disease, cervical spondylosis and radiculopathy at C6-7 on the right, referable to his employment with Employer 2.

2. Claimant's conditions are not due to a pre-existing injury or condition.

3. Claimant is entitled to appropriate medical benefits stemming from his occupational diseases; this includes the surgery recommended by Dr. Verska, for which Employer 2 is wholly liable. Claimant is also entitled to appropriate temporary disability benefits stemming from his occupational diseases.

4. Apportionment for a pre-existing injury or condition is not appropriate.

5. Application of the last injurious exposure rule is unnecessary.

## **RECOMMENDATION**

The Referee recommends the Commission adopt the foregoing Findings and Conclusions as its own and issue an appropriate final order.

DATED in Boise, Idaho, on the 25th day of April 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_  
Lora Rainey Breen, Referee

ATTEST :

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_4\_\_\_\_ day of May 2007, a true and correct copy of the foregoing **Findings Of Fact, Conclusions Of Law, And Recommendation** was served by regular United States mail upon each of the following persons:

RICK D KALLAS  
1031 E PARK BLVD  
BOISE ID 83712-7722

TYRA H STUBBS  
P O BOX 519  
BOISE ID 83701

MARK C PETERSON  
P O BOX 829  
BOISE ID 83701

jkc

\_\_\_\_\_/s/\_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

LEWIS A. (PETE) PROCTOR, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 ANDERSON & WOOD )  
 CONSTRUCTION COMPANY, INC., )  
 Employer, and AMERICAN CASUALTY )  
 COMPANY, Surety, )  
 )  
 and )  
 )  
 ORIUS CORPORATION, Employer, and )  
 ZURICH AMERICAN INSURANCE )  
 COMPANY, Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 01-022769**  
**IC 05-013965**

**ORDER**

May 4, 2007

Pursuant to Idaho Code § 72-717, Referee Lora Rainey Breen submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant incurred a compensable occupational disease, cervical spondylosis and radiculopathy at C5-6 on the left, referable to his employment with Employer 1. He further

incurred a compensable occupational disease, cervical spondylosis and radiculopathy at C6-7 on the right, referable to his employment with Employer 2.

2. Claimant's conditions are not due to a pre-existing injury or condition.

3. Claimant is entitled to appropriate medical benefits stemming from his occupational diseases; this includes the surgery recommended by Dr. Verska, for which Employer 2 is wholly liable. Claimant is also entitled to appropriate temporary disability benefits stemming from his occupational diseases.

4. Apportionment for a pre-existing injury or condition is not appropriate.

5. Application of the last injurious exposure rule is unnecessary.

Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this \_\_4\_\_ day of \_\_May\_\_\_\_\_, 2007.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
James F. Kile, Chairman

\_\_\_\_\_  
R. D. Maynard, Commissioner

\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_4\_\_ day of \_\_\_\_May\_\_\_\_\_, 2007, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

RICK D KALLAS  
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\_\_\_\_\_/s/\_\_\_\_\_